FILED BY CLERK
FEB 26 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GARY DWAYNE SKAGGS, Appellant.	2 CA-CR 2007-0136 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20062060 and CR-20063164

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Julie S. Hall
Oracle
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 Appellant Gary Skaggs was convicted after a jury trial of two counts of first-degree murder. On appeal, he challenges his convictions on numerous grounds, arguing the trial court erred in: 1) precluding evidence of third-party culpability; 2) allowing him to be shackled during trial; 3) failing to give a curative jury instruction after a bomb threat caused the entire superior court building to be evacuated; 4) permitting a knife to be admitted into evidence; 5) denying his motion to dismiss based on pre-indictment delay; 6) denying his motion for a judgment of acquittal; 7) failing to declare a mistrial or give a curative instruction after a witness testified about precluded evidence; and, 8) permitting an untimely disclosed witness to testify. He also alleges numerous instances of prosecutorial misconduct and contends the cumulative impact of all the errors requires reversal of his convictions. Finding no reversible error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). On an early morning in August 1995 Maria M. found T. and D. dead in their home. Maria's boyfriend, Santos T., had spent the night at the home, but testified he had passed out and had been unaware of the crime and had only awoken when T. and D.'s baby was crying and Maria was knocking at the door. The couple had sustained "chop-type" injuries, including lacerations and bone fractures.

¶3 Police began to suspect that Skaggs had committed the murders because he had told a few people he wanted to beat up T. after learning that T. had an affair with Skaggs's girlfriend and had "gotten [her] pregnant." Officers searched Skaggs's home and behind a dresser in the bedroom, they discovered a machete, which was consistent with having caused the couple's injuries. Skaggs was not arrested during the initial investigation of the crime. But the investigation was reopened several years later by the cold case homicide unit and, in 2006, Skaggs was charged by indictment with two counts of first-degree murder, two counts of conspiracy to commit first-degree murder, two counts of kidnapping, and one count of burglary. On Skaggs's motion, the trial court dismissed the conspiracy, kidnapping, and burglary charges because the applicable statutes of limitation had expired. After a jury trial, Skaggs was convicted of both counts of first-degree murder, and the trial court sentenced him to consecutive life terms of imprisonment, without the possibility of release for twenty-five years. This appeal followed.

Discussion

I. Denial of Rule 20 Motion

¶4 Arguing there was insufficient evidence to support his convictions, Skaggs contends the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. We review the trial court's ruling on a Rule 20 motion "'for an abuse of discretion and will reverse . . . only if there is a complete absence of substantial evidence to support the charges.'" *State v. Ross*, 214 Ariz. 280, ¶ 21, 151 P.3d 1261, 1264

(App. 2007), *quoting State v. Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d 118, 121 (App. 2001). "Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004); *see* Ariz. R. Crim. P. 20. Even if reasonable persons could "fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996).

¶5 When addressing a challenge to the sufficiency of the evidence, we view the facts in the light most favorable to sustaining the verdict and resolve all inferences against the defendant. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). We also accept that the jury's function is to weigh all of the evidence and to assess credibility. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). And, in reviewing for substantial evidence to support a conviction, no distinction exists between circumstantial and direct evidence. *See State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

¶6 Relying on *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965), Skaggs argues the state could not use "the murders [to] establish[] the necessary elements for burglary, and

the burglary [to] establish[] the necessary elements for felony murder."[1] Thus he maintains "[t]here was simply no evidence to support the burglary which was alleged as the underlying felony" for the felony murder charge. First, this argument, even if otherwise valid, does not apply to Skaggs's conviction for T.'s murder because the jury found Skaggs guilty of premeditated murder and felony murder, not just felony murder. Moreover, in *State v. Moore*, 222 Ariz. 1, 213 P.3d 150 (2009), our supreme court has expressly addressed and rejected the same argument Skaggs raises here, which was "that felony murder cannot be based on a burglary . . . intended solely to murder the victim." *Id.* ¶¶ 61-62. Although Skaggs argues *Moore* was wrongly decided, we are bound by the decisions of our supreme court. *State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007).

¶7 Alternatively, Skaggs contends "there was no[] substantial evidence to support [his] involvement in the crimes." Evidence presented at trial showed a knife or machete found behind a dresser in Skaggs's home was consistent with the weapon used to kill the victims. Kristen M., who had been a babysitter for Skaggs's brother, testified a weapon that looked like the one found in Skaggs's home had been hanging on the wall in his brother's

---

[1]"A person commits first-degree murder if . . . the person commits or attempts to commit . . . burglary under [A.R.S. §]§ 13-1506, 13-1507 or 13-1508 . . . and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person." A.R.S. § 13-1105. A person commits burglary in the first degree by, *inter alia*, "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein" while "knowingly possess[ing] . . . a deadly weapon or a dangerous instrument in the course of committing any theft or any felony." §§ 13-1507, 13-1508.

home until the morning of the murders, when it disappeared. In a deposition, the transcript of which was later admitted at trial, Agness N. testified she had overheard Skaggs and his brother talking before the murders and Skaggs had stated: "That goddamn Mexican's gonna get it," referring to T. Another witness, Brian B., testified that two or three days before the murders Skaggs had told him that T. had been having an affair with Skaggs's girlfriend and had gotten her pregnant. That same day, Skaggs asked Brian to go with him to T. and D.'s house so that Skaggs could "beat the . . . shit out of [T]." When they arrived, Skaggs pulled a pipe from under the seat. He knocked on the front door of the house, and they left when it became apparent no one was home. A few days later, Skaggs climbed through Brian's bedroom window in the middle of the night and told Brian that he had "t[aken] care of [T.]" and he had to "take care of [D.] too, because she woke up." Skaggs's girlfriend also testified she had told police Skaggs had told her that he had "gotten away with murder," which she understood to mean T.'s and D.'s murders.

¶8 Skaggs argues the evidence presented against him was "wholly incredible" and was "not enough to convince a reasonable person beyond a reasonable doubt of [his] guilt." But credibility of the evidence is a matter for the jury to decide, not this court. *See State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996). And, even though the state's case was based on circumstantial, rather than direct, evidence, there is "no distinction" between the two. *Stuard*, 176 Ariz. at 603, 863 P.2d at 895. A conviction may be based entirely on

circumstantial evidence. *State v. Fulminante*, 193 Ariz. 485, ¶ 25, 975 P.2d 75, 83-84 (1999). We cannot say the trial court erred in denying Skaggs's Rule 20 motion.

II. Third-Party Culpability Evidence

¶9 Skaggs contends the trial court erred in precluding him from introducing evidence that another man, Mark W., had been seen outside the victims' home sometime before the murders and had confessed to killing them. A trial court's decision on the admissibility of third-party culpability evidence is reviewed under an abuse of discretion standard. *State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002). "It is permissible for a defendant to attempt to show that another person committed the crime for which he is charged, but it remains in the trial court's discretion to exclude the evidence if it offers only a possible ground of suspicion against another." *Id.* (citation omitted).

¶10 Before trial, the state moved to preclude "evidence offered by the defense regarding the third-party culpability of Mark W[.]" In response, Skaggs moved to admit statements made by Charlotte F. during a 1995 police interview that Mark had "expressed responsibility for the murders." Charlotte told police that on the morning after the murders Mark demanded that she have sex with him and told her that if she refused he would "kill [her] just like [he] killed them." The trial court precluded the statements finding, *inter alia*, that it was not relevant under Rule 401, Ariz. R. Evid., because Mark "did not identify who he meant by 'them.'"

¶11 After the trial court ruled on the motions, Skaggs filed a supplemental response to the state's motion, moving the court to "allow admission of testimony from[] Cathy C[.]"[2] According to Skaggs, Cathy was a friend of Charlotte's and had provided a statement to Skaggs's investigator about Mark. A transcript of the statement was attached to the supplement. In the statement, Cathy stated Charlotte had told her about the incident between Charlotte and Mark. Charlotte said that Mark "had confessed to her that . . . he killed a couple on Columbus," the street on which the victims had lived, and "if she told anybody he would cut her up and her kids just like he did them." Cathy also described a "brief . . . encounter" she and Charlotte had with Mark on Columbus apparently sometime before the murders. She stated Mark had been on a bicycle out by the street in front of a house and some apartments, "as if he . . . was waiting for somebody to come home." After the murders Charlotte told her the victims had lived in that "general area." Cathy also told the investigator Charlotte had told her that Mark had killed the couple "over a drug debt." Skaggs filed "request[s] for attendance of out-of-state witness[es]," requesting that the court find Charlotte and Cathy "necessary and material" witnesses and give them "protection from . . . arrest or the service of process."

---

[2]On the fourth day of trial, Skaggs filed a second supplement, which included a transcript of a recent telephone conversation between Cathy and the investigator and contained more details than the earlier statement. However, Skaggs made no attempt to admit this statement into evidence and instead moved "to delay the trial to allow [him] to investigate [Cathy further]. Skaggs does not challenge on appeal the court's denial of this motion. Thus, we do not consider the statements contained in the second supplement.

¶12 At a pretrial motions hearing held the following day, Skaggs's counsel acknowledged the trial court's previous ruling excluding third-party culpability evidence,[3] but stated he "wanted to supplement the record and make sure that I was giving as much information that I had at this time." The court "reaffirm[ed] all its rulings in the case to date" and denied Skaggs's "request for the attendance of out-of-state witnesses."

¶13 Rules 401, 402, and 403, Ariz. R. Evid., set forth the standard for admission of third-party culpability evidence. *See State v. Gibson*, 202 Ariz. 321, ¶ 12, 44 P.3d 1001, 1003 (2002). In order to determine the admissibility of such evidence, "the court must [first] determine if the proffered evidence is relevant." *Id.* ¶ 13. Under Rule 401, evidence is relevant, and therefore admissible, if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The "proper focus in determining relevancy is the effect the evidence has upon the *defendant's* culpability. To be relevant, the evidence need only *tend* to create a reasonable doubt as to the defendant's guilt." *Gibson*, 202 Ariz. 321, ¶ 16, 44 P.3d at 1004.

¶14 As noted above, the trial court concluded the third-party culpability evidence was not relevant because Mark did not identify the "them" he claimed to have murdered. We

---

[3]Skaggs's response to the state's motion to preclude third-party culpability evidence addressed only Charlotte's testimony, not Cathy's. But, in that motion Skaggs argued broadly that "[Mark]'s inculpatory statements clearly provide a tendency to create reasonable doubt as to the defendant's guilt," and that the trial court should therefore "allow admission of testimony regarding third-party culpability and [Mark]."

disagree. "The threshold for relevance is a low one." *State v. Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d 368, 396 (2006). The third-party culpability evidence Skaggs produced included Mark's statement to Charlotte that he had killed "them" and "left that little baby." Additionally, Cathy stated she had seen Mark on the street in front of the victims' home sometime before the murders, "as if he . . . was waiting for somebody to come home." And Cathy stated that Charlotte had told her that the victims had owed Mark a drug debt. Considered as a whole, this evidence suggests Mark had motive, opportunity, and knowledge of the murders with which Skaggs was charged. It therefore had a tendency to create reasonable doubt as to his guilt and thus was relevant. *See Gibson*, 202 Ariz. 321, ¶ 16, 44 P.3d at 1004.

¶15 This does not end our inquiry, however. Relevant evidence is admissible only if it is not otherwise excluded. *See* Ariz. R. Evid. 402. The proffered testimony of Charlotte and Cathy included statements made to them by others—Mark's statements to Charlotte and Charlotte's statements to Cathy about Mark's statements to Charlotte—and are, therefore, hearsay. *See* Ariz. R. Evid. 801 ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *State v. Hoskins*, 199 Ariz. 127, ¶¶ 59-64, 14 P.3d 997, 1013-14 (2000) (applying hearsay rules to third-party culpability evidence). And hearsay is generally inadmissible unless an exception applies. Ariz. R. Evid. 802.

¶16 The trial court considered the statements' admissibility under the "statement against interest" hearsay exception, *see* Ariz. R. Evid. 804(b)(3), but concluded that the evidence "[wa]s not admissible as a statement against interest [because] a reasonable person in [Mark]'s situation at the time would not believe he was exposing himself to criminal liability by th[e] statement[s] to [Charlotte]."[4] A "statement against interest" is a statement that "at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . , that a reasonable person would not have made the statement unless believing it to be true." Ariz. R. Evid. 804(b)(3); *see also State v. Henry*, 176 Ariz. 569, 575, 863 P.2d 861, 867 (1993). And such a statement is "not excluded by the hearsay rule if the declarant is unavailable as a witness." Ariz. R. Evid. 804(b). However, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.*

¶17 Thus, there are three requirements that must be met before a statement against interest can be admitted when offered by a defendant: 1) the statement must be against the declarant's interest, 2) the declarant must be unavailable to testify, and 3) there must be corroborating circumstances to demonstrate the reliability of the statement. *State v. Tankersley*, 191 Ariz. 359, ¶¶ 46-47, 956 P.2d 486, 497 (1998). According to Charlotte,

---

[4]Skaggs does not argue on appeal that the statements are admissible on Sixth Amendment constitutional grounds notwithstanding their preclusion on hearsay grounds. We therefore do not address this issue.

Mark confessed to committing two murders and his statement included information specific to the particular homicides at issue here—namely leaving a baby unharmed. Thus, the statement was against Mark's interest. *See id.* ¶ 46 (for statement to be considered against interest, it need not be direct confession of guilt; rule includes "disserving statements by . . . declarant that would have probative value in . . . trial against . . . declarant"). Next, the proponent of the evidence must establish the declarant's unavailability to testify at trial. Here, nothing in the record suggests Mark was unavailable to testify in order to provide a basis for the trial court permitting Charlotte's and Cathy's testimony about Mark's out-of-court statements. Although neither party addresses this issue, we need not do so because Skaggs has not satisfied the third requirement for the admissibility of the statements—that "corroborating circumstances [exist] that 'clearly indicate the trustworthiness of the exculpatory statement.'" *Id.* ¶ 45, *quoting State v. LaGrand*, 153 Ariz. 21, 27, 734 P.2d 563, 569 (1987); *see also State v. Ellison*, 213 Ariz. 116, ¶ 49, 140 P.3d 899, 914 (2006).

¶18 There are a number of factors to consider in determining the trustworthiness of a statement against interest, including

> the existence of supporting and contradictory evidence, the relationship between the declarant and the listener, the relationship between the declarant and the defendant, the number of times the statement was made, the length of time between the event and the statement, the psychological and physical environment at the time of the statement, and whether the declarant would benefit from the statement.

Tankersley, 191 Ariz. 359, ¶ 45, 956 P.2d at 497.

¶19 There was some evidence supporting the reliability of Mark's statements. He knew some details from the crime, and there did not appear to be any evidence, apart from that which linked Skaggs to the murders, that contradicted Mark's statements. There similarly appeared to be no relationship between Skaggs and Charlotte, Mark, or Cathy that suggested they were trying to manufacture reasonable doubt on his behalf. However, according to Charlotte, Mark made these statements so that she would not resist his sexual advances or report any sexual assault to the police. The physical and psychological environment was thus one of intimidation and not one of confession. Under these circumstances, Mark could assume Charlotte would not report his actions to the police. And, he clearly had a motive to lie or brag about his involvement in the murders in order to secure a benefit for himself. *See Ellison*, 213 Ariz. 116, ¶ 49, 140 P.3d at 914 (trial court did not err in excluding codefendant's admission of guilt to cell mate where codefendant "may have simply bragged about the murders to protect himself"). We therefore cannot say the trial court abused its discretion in concluding that Mark's statements to Charlotte were not sufficiently reliable as to be admissible. *See Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d at 193.

¶20 Cathy's proposed testimony consisted of what she had been told by Charlotte, who in turn was relating to Cathy what she had been told by Mark. Cathy's testimony thus contained multiple hearsay, which is not admissible unless there is a hearsay exception applicable to each part. *State v. Montano*, 136 Ariz. 605, 607, 667 P.2d 1320, 1322 (1983). And, as we have already stated, Mark's statements to Charlotte lacked the requisite indicia

of reliability. Additionally, to the extent Cathy also intended to testify that she had seen Mark on the street in the "general area" in front of the victims' house, in the absence of the additional evidence linking Mark to the murders, this testimony "offers only a possible ground of suspicion against another." *See Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d at 193. It was thus within the trial court's discretion to exclude it. *See id.* Therefore, the court did not abuse its discretion in excluding Charlotte's and Cathy's testimony and precluding Skaggs from introducing third-party culpability evidence with respect to Mark. *See id.*

III. Use of Restraints During Trial

¶21 Skaggs maintains the trial court should not have allowed him to be restrained during trial and erred in denying his motion for mistrial "when the jury was made aware" he was shackled. But, as Skaggs concedes, the jury never saw that he was shackled. Rather, Skaggs bases his argument on an exchange between the prosecutor and Skaggs while Skaggs was testifying. At one point the prosecutor, who was apparently using an easel, asked Skaggs to draw a diagram of the victims' house. The court immediately asked the prosecutor if he would "move that over to him so he can draw it." The prosecutor did so and Skaggs drew the diagram, which was then moved back so the jury could see it. After the jurors were excused for lunch, Skaggs's counsel commented that the prosecutor had "put him in a pretty awkward position," and stated that he "d[id no]t mind asking the court . . . that he be unshackled so it doesn't look like he's tied to the table." The court stated it believed the

prosecutor's actions had been inadvertent and that it would not happen again. There was no further discussion of the matter.

¶22 On appeal, Skaggs argues "nothing indicates [he] at any time was at all difficult or uncooperative in the courtroom" and he therefore should not have been shackled. But, other than the exchange related above, in which he arguably requested to be unshackled, Skaggs does not cite to anything in the record to show he raised this argument below. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Because the record is silent as to why Skaggs was shackled, we cannot determine whether the trial court abused its discretion in determining Skaggs should be shackled. *See State v. Watson*, 114 Ariz. 1, 11, 559 P.2d 121, 131 (1976) (trial court has discretion to order restraints on a prisoner when "necessary to prevent escape or to maintain order in the courtroom").

¶23 Even assuming, however, Skaggs is correct that the trial court had no basis for allowing him to be shackled in the courtroom, "[a]n appellate court will not find error on the ground that the defendant was shackled unless it is shown that the jury saw the shackles." *State v. McMurtrey*, 136 Ariz. 93, 98, 664 P.2d 637, 642 (1983). This is because "an unseen 'restraint could not have affected the presumption of innocence.'" *State v. Mills*, 196 Ariz. 269, ¶ 13, 995 P.2d 705, 708-09 (App. 1999), *quoting Castillo v. Stainer*, 983 F.2d 145, 149 (9th Cir. 1992), *amended*, 997 F.2d 669 (9th Cir. 1993). Skaggs nevertheless argues the jurors did not have to see the shackles to be made aware he was wearing them and for error to have occurred. Although we agree that jurors conceivably could be made aware a

defendant was wearing shackles by some other means, there must be some showing that they were in fact aware. Again, nothing in the record establishes the jurors were in fact aware Skaggs was shackled. His argument that the jurors necessarily learned he was shackled is purely speculative. He did not ask the court to question jurors about the matter, nor did he seek "to make an evidentiary record after trial." *State v. Apelt*, 176 Ariz. 349, 361, 861 P.2d 634, 646 (1993). In the absence of any such evidence, we will not find error. *See McMurtrey*, 136 Ariz. at 98, 664 P.2d at 642.

IV. Bomb-threat Evacuation

¶24 During jury deliberations the Pima County Superior Court building apparently received a bomb threat that resulted in the evacuation of the entire building.[5] Skaggs argues the trial court should have instructed the jury that the threat was unrelated to the case and should have questioned them about "the possible effect the bomb scare might have had on them." As the state points out, however, Skaggs did not request any such instruction, nor did he object to the trial court's failure to question jurors or sua sponte give an instruction. He has therefore forfeited the right to seek relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶25 Skaggs asserts the evacuation for the bomb threat essentially amounted to jury tampering, which he maintains "is akin to fundamental error." But, unlike the situations in

[5]Skaggs moved to amend the minute entry showing the time the jury had retired and the time it had rendered a verdict in order to reflect that the jury had ceased deliberating due to the bomb threat. The trial court denied that motion.

the cases on which Skaggs relies, there was no evidence of jury tampering here. *Cf. United States v. Dutkel*, 192 F.3d 893, 894 (9th Cir. 1999) ("Once tampering is established, we presume prejudice and put a heavy burden on the government to rebut the presumption."). In his post-trial motion requesting the trial court to correct its minute entry regarding the bomb threat, Skaggs acknowledged everyone was evacuated from the court building, and nothing in the record establishes or even suggests that the threat was related to Skaggs's trial. Indeed, the record does not show that the jurors were given any explanation why they were evacuated from the building. And, there is no record of the court having received any reports suggesting the evacuation had influenced the jurors. *See United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007) ("When a source presents the court with a 'colorable claim of juror bias,' the court must make some inquiry of the juror, whether through an in camera hearing or otherwise, to determine whether the allegedly affected juror is incapable of performing the juror's functions impartially."), *quoting Dyer v. Calderon*, 151 F.3d 970, 974-75 (9th Cir. 1998). In the absence of any such claim or any suggestion the bomb threat was "'about the matter pending before the jury,'" we cannot say the court had a duty to investigate. *Dutkel*, 192 F.3d at 894-95, *quoting Remmer v. United States*, 347 U.S. 227, 229 (1954). Thus, Skaggs has failed to sustain his burden of establishing there was error, let alone fundamental error. *Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608.

V. Admission of Knife in Evidence

¶26 Skaggs next asserts the trial court erred in precluding the admission of a "ghurka" knife or machete that had been seized from his home. He contends, "No physical evidence or witness testimony connected the knife to the scene of the crime." "We review the trial court's ruling on the admissibility of evidence for a clear abuse of discretion." *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008).

¶27 Before trial, Skaggs moved to preclude the knife, arguing it was prejudicial because the state's forensic examiner could not say it was the murder weapon and no blood, tissue, or hair had been found on the knife connecting it to the crime. The trial court denied the motion, stating that it would have to weigh the knife's relevance against the prejudice its admission would cause at trial. At trial, the detective who originally had investigated the case testified that officers had found the knife behind a dresser during the search of Skaggs's home. The court admitted the knife over Skaggs's objection on relevance grounds.

¶28 Quoting *State v. Gallagher*, 97 Ariz. 1, 7, 396 P.2d 241, 245 (1964), Skaggs maintains that "[t]o be admissible, a weapon must be 'properly connected to the crime in question.'" He contends, essentially, that the state must produce an eyewitness to identify the weapon or present conclusive evidence that the weapon was in fact the weapon used in the commission of the crime. But, our supreme court has rejected Skaggs's proposed reading of the court's ruling in *Gallagher*. In *State v. Greenawalt*, 128 Ariz. 388, 395, 626 P.2d 118, 125 (1981), the court stated:

> The meaning of "properly connected to the crime in question" is unclear. Appellants take it to mean that unless a weapon was shown to have been fired or to have been pointed out of the van, the weapon was irrelevant since its admission did not make the fact of assault with a deadly weapon any more probable than not. We believe appellants' argument and interpretation of *Gallagher* confuses relevancy with the sufficiency of the State's evidence to avoid a directed verdict.

¶29 To be relevant, evidence must merely "tend[] to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. And, in *State v. Brierly*, 109 Ariz. 310, 318, 509 P.2d 203, 211 (1973), our supreme court found "testimony that [a certain dagger] could have been used to produce the cuts on the victim's head" was sufficient to make the dagger relevant evidence against Brierly and to allow for its admission into evidence.

¶30 In this case, the state's forensic pathologist testified the knife found in Skaggs's home had a rusted surface that was consistent with "the type of abrasive sides [of a weapon] that could cause abrasions or redness to the wounds" sustained by the victims. She also testified the knife was "consistent with the wounds sustained to [T.'s] face" and was consistent with D.'s injuries as well. She also stated that although she could not conclusively "rule it in or rule it out," it was possible that the knife could have caused bruising found on

T.'s back.[6] In view of this evidence, we cannot say the trial court abused its discretion in admitting the knife as the murder weapon.

VI. Pre-indictment Delay

¶31 Skaggs challenges the trial court's denial of his motion to dismiss on the ground of prejudicial pre-indictment delay. He contends the eleven-year delay between the date the offenses were committed and his indictment violated his due process rights. He asserts that during that period of time a defense witness had died, other witnesses' memories had faded, employment records that could have aided his defense were destroyed, and recordings of various interviews were lost. And, according to Skaggs, the police "had all of the evidence [the state] needed to charge [him] by 1997" and its failure to do so denied him due process.

¶32 "The due process clause plays only a limited role in evaluating pre-indictment delay. The primary guarantee against a stale prosecution is the statute of limitations." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988). Skaggs was charged with first-degree murder, and the applicable statute of limitations for that offense provides that a prosecution could "be commenced at any time." *See* A.R.S. § 13-107.

---

[6]Skaggs argues that "no rust particles were found in the victims' wounds even though the knife itself was rusty." But, the forensic examiner testified "any rust that may have existed . . . could have been flushed out by the blood loss." Skaggs also points out that "no trace of DNA [deoxyribonucleic acid] evidence was found on the knife." Such contradictory evidence, however, would go to the weight of the evidence, not its admissibility.

¶33 "The due process guarantee of the Fifth and Fourteenth Amendments to the United States Constitution . . . protects defendants from unreasonable delay." *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996). But, the protection provided by the due process guarantee "is narrower than that provided by statutes of limitation. A person claiming a due process violation must show that the prosecution intentionally slowed proceedings to gain a tactical advantage or to harass the defendant, and that actual prejudice resulted." *Id.* (citations omitted).

¶34 In the motion he filed in the trial court, Skaggs argued the state's delay in seeking an indictment prejudiced him and was "improperly motivated by the State's desire to gain a tactical advantage." He contended the delay therefore violated his due process rights under the Arizona Constitution and the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. The court denied the motion, finding Skaggs had failed to establish actual prejudice and had not shown the state intentionally had delayed his indictment.

¶35 On appeal, Skaggs contends "[t]he trial court erred in applying the wrong standard for analyzing the delay" because it "required the defense to show the delay was intentional, but did not consider that a negligent delay may also violate a defendant's constitutional rights." Even assuming this argument was not forfeited by Skaggs's failure to present it below, *see Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, it is without merit.

¶36 In support of his argument that a delay resulting from the state's negligence could be regarded as a due process violation, Skaggs relies on *United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977). There, the Ninth Circuit stated that negligent conduct by the state could be considered "since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." But, the court applied a test that "balances the factors in the individual situation" to determine if a due process violation has occurred, not the two-element test Arizona courts have followed. *Id.* at 677. And, "[w]e are not bound by the Ninth Circuit's interpretation of what the Constitution requires." *State v. Montano*, 206 Ariz. 296, n.1, 77 P.3d 1246, 1247 n.1 (2003).

¶37 The courts of this state have repeatedly ruled that "[t]o establish that pre-indictment delay has denied a defendant due process, there must be a showing that the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, *and* that the defendant has actually been prejudiced by the delay." *Broughton*, 156 Ariz. at 397, 752 P.2d at 486; *State v. Lemming*, 188 Ariz. 459, 462, 937 P.2d 381, 384 (App. 1997) ("Arizona courts have interpreted [*United States v.*] *Marion* [, 404 U.S. 307 (1971)], and [*United States v.*] *Lovasco*[, 431 U.S. 783 (1977),][7] to require that a defendant show intentional delay by the prosecution to obtain a tactical advantage, and actual and substantial prejudice as a result of the delay."); *see also State v. Williams*, 183 Ariz. 368,

[7]In *Marion* and *Lovasco*, the Supreme Court considered claims of pre-indictment delay and, in *Lovasco*, stated "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." 431 U.S. at 790.

379, 904 P.2d 437, 448 (1995); *State v. Everidge*, 188 Ariz. 46, 47, 932 P.2d 802, 803 (App. 1996). Thus, the trial court did not err in ruling Skaggs had to establish the state intentionally had delayed indicting him to gain a tactical advantage.

¶38 Even assuming, however, that a delay resulting from negligence could amount to a due process violation under Arizona case law, Skaggs has not established the pre-indictment delay was the result of anything but investigative challenges. Indeed, at the hearing on Skaggs's motion, the prosecutor told the trial court the state had been trying to find certain witnesses, some of whom had been located within the six months before trial. And, Skaggs focused on the prejudice that would result from the evidence that had been lost in the eleven years since the offenses had been committed, but did not dispute that the state had been investigating the crimes in good faith during that time. Delay for investigative reasons does not violate a defendant's due process rights "even if his defense might have been somewhat prejudiced by the lapse of time." *Broughton*, 156 Ariz. at 398, 752 P.2d at 487.

¶39 Additionally, Skaggs bears a "heavy burden to prove that pre-indictment delay caused actual prejudice." *State v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (App. 1996), *quoting Broughton*, 156 Ariz. at 397-98, 752 P.2d at 486-87. In *Dunlap*, another department of this court concluded that in order to demonstrate actual prejudice, a defendant must show not only that a witness was unavailable, but also that the witness would have testified at trial, the substance of the witness's testimony, and that there was a "reasonable

basis to assume the jury's verdicts would have been different with his testimony." *Id.* at 451, 930 P.2d at 528; *see also State v. Lemming*, 188 Ariz. 459, 462, 937 P.2d 381, 384 (App. 1997). Although Skaggs points to numerous potential items of evidence lost by the state over the years, we cannot say the trial court erred in determining he had not sustained his burden of demonstrating he was actually prejudiced as a consequence.

VII. Prosecutorial Misconduct

¶40 Skaggs asserts "[t]he prosecutor's misconduct violated [his] constitutional rights." Skaggs did not object below, however, to any of the statements he now contends were misconduct. We therefore review solely for fundamental, prejudicial error.[8] *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

> Prosecutorial misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which [s]he pursues for any improper purpose with indifference to a significant resulting danger of mistrial."

State v. Aguilar, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending statements, in

[8]In his reply brief, Skaggs maintains he objected to the prosecutor's vouching for a witness. In support of this position, however, he refers only to his motion for new trial, which was insufficient to preserve the argument, *see State v. Johnson*, 122 Ariz. 260, 267, 594 P.2d 514, 521 (1979), and to a discussion at the bench which was too vague to be considered an objection to the prosecutor's statements.

the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d 833, 846 (2006), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998).

¶41 "The first step in evaluating [Skaggs's] prosecutorial misconduct claim is to review each alleged incident to determine if error occurred." *See State v. Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d 368, 403 (2006) (citations omitted). Even if an incident is not itself error, however, it "may nonetheless contribute to a finding of persistent and pervasive misconduct, if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and 'did so with indifference, if not a specific intent, to prejudice the defendant.'" *Id.* ¶ 155 (citations omitted), *quoting Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d at 1192. We therefore review the alleged incidents for error and to determine if any of them "should count toward [Skaggs's] prosecutorial misconduct claim." *See id.* We will then determine the cumulative effect on the fairness of Skaggs's trial. *See id.*

¶42 Skaggs first argues the prosecutor should not have informed potential jurors in his opening statement that the victims' family members were in the courtroom during voir dire. He also asserts it was improper for the prosecutor, also in his opening statement, to comment on questions asked by a prospective juror during voir dire about the lack of physical evidence in the case. According to Skaggs, the prosecutor's admonition to the jury that it was "obligated to hear the evidence for what it is, not for what it isn't" and his subsequent comment during closing argument that a lack of physical evidence "is not and should not be

considered reasonable doubt," was an improper "misstatement of the law." Skaggs has not, however, cited any authority to support the proposition that a prosecutor commits misconduct by mentioning that a victim's family is in the courtroom or by urging jurors to consider only the evidence presented at trial in reaching a verdict. Those arguments therefore are waived. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶43 Additionally, Skaggs asserts that, in his opening statement, the prosecutor improperly "alluded to the existence of additional, incriminating evidence against [him] that the jury might not hear." The prosecutor stated that Skaggs's name had "c[o]me up" "very quickly" in the investigation of the crime and told the jury "[s]ome of the reasons why you may hear, some you may not." We cannot say, however, that these statements suggested any particular witness's testimony was supported by information that was not before the jury, "nor did [the prosecutor] refer to any inadmissible evidence for the jury to consider." *State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989). Rather, the statement is consistent with the purpose of an opening statement, which is "'to apprise the jury of what the party expects to prove and prepare the jurors' minds for the evidence which is to be heard.'" *State v. King*, 180 Ariz. 268, 276, 883 P.2d 1024, 1032 (1994), *quoting State v. Lee*, 110 Ariz. 357, 360, 519 P.2d 56, 59 (1974).

¶44 In any event, the trial court instructed the jurors that opening statements are not evidence, but merely "statements of what each side think[s] the evidence will be." And, we

presume jurors follow the instructions they are given. *State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007). Thus, even assuming Skaggs could show the prosecutor intentionally had made the improper statement, *see Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27, he has not sustained his burden of establishing he was prejudiced as a result. *See Henderson*, 210 Ariz. 561, ¶¶ 20, 22, 115 P.3d at 607, 608.

¶45 Skaggs also argues the prosecutor vouched for witness Santos T. During closing argument, the prosecutor commented, "[D]uring the course of this trial, although it wasn't said to you specifically, the inference is that Santos killed his best friend. He did it. He's the one." Then, after discussing the evidence that had been presented at trial to rebut that inference, the prosecutor told jurors: "So he is not your killer in this case. I stand on that. My strongest argument. He is not your killer."

¶46 "It is black letter law that it is improper for a prosecutor to vouch for a witness." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). "Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *Dumaine*, 162 Ariz. at 401, 783 P.2d at 1193. We are not persuaded the prosecutor was vouching for Tiznado as a witness but instead was arguing against any suggestion that the evidence pointed to Tiznado as the murderer. "Wide latitude . . . is given in closing arguments, and counsel may comment on evidence and argue all reasonable inferences therefrom." *Id.*

¶47 Even assuming the prosecutor's statements noted above placed the prestige of the government behind Tiznado, we cannot say the statement constitutes fundamental error. The trial court instructed the jury that the arguments of counsel are not evidence. And jurors are presumed to follow instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Therefore, even if the prosecutor's comment was improper, the jury instructions negated or mitigated any negative impact. *See State v. Morris*, 215 Ariz. 324, ¶ 55, 160 P.3d 203, 216 (2007) ("Even if the prosecutor's comments were improper, the judge's instructions negated their effect."); *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) ("[T]he superior court instructed the jury that anything said in closing arguments was not evidence. We presume that the jurors followed the court's instructions.").

¶48 Ultimately, "[i]n determining whether a prosecutor's improper statement constitutes fundamental error, we examine, under the circumstances, whether the jurors were probably influenced and whether the statement probably denied Defendant a fair trial." *Bible*, 175 Ariz. at 601, 858 P.2d at 1204. In view of the record before us, "we do not believe that the statement[s] tipped the scales of justice and denied [Skaggs] a fair trial." *See id.*

¶49 Skaggs next asserts the prosecutor told jurors Skaggs had "colluded with his defense counsel to construct lies in his testimony." In his closing argument, the prosecutor discussed the testimony of Kristen M., who had seen the knife found in Skaggs's home on the wall in his brother's house until the morning of the murder. He stated: "Now, Mr. Skaggs—correction—Mr. Lange [defense counsel] is right, oh, it was in my house all along,

because there had to be a way in his testimony to nullify the significance of that weapon." When taken in context, however, the prosecutor was questioning the veracity of Skaggs's testimony and was not implying any kind of collusion between Skaggs and his attorney. The prosecutor attributed the statement to which he was referring to Skaggs but had confused the two men's names just a few moments earlier in his closing argument. We cannot say, therefore, the prosecutor impugned defense counsel's integrity. *Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d at 1198 ("Jury argument that impugns the integrity or honesty of opposing counsel is . . . improper.").

¶50 Skaggs claims "the 'cumulative' effect of all the misconduct violated [his] constitutional right to a fair trial." *See Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403. To find cumulative error, we must find multiple instances of prosecutorial misconduct occurred, which ultimately prejudiced a defendant's case. *See Hughes*, 193 Ariz. 72, ¶¶ 24-25, 969 P.2d at 1191. Here, we found only one arguable instance of improper argument, which was cured by the trial court's curative instructions. We therefore find no cumulative error.

VIII. Evidence of Drug Dealing

¶51 Skaggs argues the trial court erred in failing sua sponte to declare a mistrial or to instruct the jury to disregard the testimony of Brian B., a prosecution witness, after he testified Skaggs "used to deal in drugs." Before trial, the court had ruled evidence of drug use by Skaggs and his acquaintances was admissible at trial, but evidence of drug dealing was inadmissible. At a motions hearing, Skaggs raised some concerns about evidence of

drug dealing by the victims, witnesses, and himself. Likewise, the state moved to preclude testimony about drug activity, "as it implicates someone else in the commission of this homicide," unless Skaggs made an offer of proof. The court stated, "To the extent the defense gets into this milieu of drug using and drug dealing, especially with regard to the victim, the State will have the ability to the extent the facts allow, to bring the defendant into that same milieu."

¶52 Before Brian testified, the trial court instructed him that he was "not to testify about any drug dealing," although he could discuss drug use. During cross-examination, Skaggs's counsel asked Brian about telephone calls Brian had made to Skaggs's girlfriend in an attempt to talk to Skaggs and get him "to tell [Brian] over the phone that he did it." Brian testified:

> The detectives told me to call up there and just try to—we tried to come up with a thing that might work, and I knew that they used to deal in drugs. So I came up with trying to call him and see if maybe I could get ahold [sic] of [Skaggs] about some drugs.

Skaggs did not object to the statement, move to have it stricken, or move for a mistrial.[9]

---

[9]Generally, "an objection is not required when a motion in limine has been made." *State v. Lichon*, 163 Ariz. 186, 189, 786 P.2d 1037, 1040 (App. 1989). To determine if a pretrial motion "has preserved an issue on appeal, '[t]he essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived.'" *Id.*, *quoting State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975). Here, although Skaggs did not object when Brian made the statement, we cannot say the argument is waived because, based on its instruction to Brian at the start of his testimony, the trial court was aware of Skaggs's objection to testimony about his drug dealing.

¶53 Even assuming the trial court abused its discretion in failing sua sponte to strike the testimony or grant a mistrial, a proposition for which Skaggs cites no authority, *see* Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., we conclude any possible error was harmless. *See State v. Jones*, 185 Ariz. 471, 486, 917 P.2d 200, 215 (1996) ("Error is harmless if it can be shown beyond a reasonable doubt that the error did not affect the verdict."). As the state points out, there were numerous "references to illegal drug use by [Skaggs]" and, therefore, "a single passing reference to drug dealing could not have affected the verdict." Notably, the offending testimony was elicited during Skaggs's cross-examination of Brian, not during the state's direct examination, and appears to be directly responsive to the question asked.

IX. Rebuttal Witness

¶54 Skaggs also contends the trial court erred in permitting Tabitha B. to testify at trial and, at a minimum, the court should have granted a continuance to allow Skaggs to prepare for her testimony. We review a trial court's decision whether or not to preclude evidence as a sanction for a discovery violation for an abuse of discretion. *See State v. Tucker*, 157 Ariz. 433, 439, 759 P.2d 579, 585 (1988).

¶55 On the third day of trial, the state informed the trial court it was considering calling Tabitha to testify as a rebuttal witness. Tabitha had been included on the state's witness lists before trial, but was not included in its final witness list. Skaggs objected, arguing Tabitha "was not on the witness list recently, and so nobody has dug into her background . . . [or] history." The court permitted Skaggs to interview Tabitha, after which

it allowed her testimony over Skaggs's objection. The court, however, limited her testimony to certain evidence supporting Brian B.'s testimony about Skaggs's failed attempt to locate T. before the murders and his visit to Brian's home after the crime.

¶56 We cannot say the trial court abused its discretion in allowing this limited testimony. The preclusion of evidence "is rarely an appropriate sanction" for a discovery violation. *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). And, unlike the situation in *Taylor v. Illinois*, 484 U.S. 400, 416 (1988), on which Skaggs relies, there is no indication here that the state engaged in any kind of "willful" or "blatant" discovery violation. The state had included Tabitha B. as a potential witness on its witness lists months before trial.

¶57 Although Skaggs now argues the trial court should have granted "a continuance to permit the defense to investigate the witness," it is unclear whether such a request was made below. During the discussion of Skaggs's objection to Burke's testimony, the court mentioned a "motion to preclude rebuttal evidence," but no written motion appears in the record. We therefore cannot ascertain what was asserted in the motion. Even assuming Skaggs had requested a trial continuance, however, we find no abuse of discretion in the court's denial of any such request. Skaggs was aware the state had listed Tabitha as a possible witness as early as December 2006, more than two months before trial. There was also almost a week between the time the state informed the court it intended to call Tabitha

and her actual testimony in court. And, Skaggs had the opportunity to interview her before she testified.

X. Cumulative Error

¶58 Skaggs argues that "[a]ll of the errors at trial combined to deny [him his] constitutional rights." But, Arizona does not recognize the cumulative error doctrine outside the context of prosecutorial misconduct. *Hughes*, 193 Ariz. 72, ¶ 25, 969 P.2d at 1190-91. "This lack of recognition is based on the theory that 'something that is not prejudicial error in and of itself does not become such error when coupled with something else that is not prejudicial error.'" *Id.*, *quoting State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996). We therefore reject this claim.

Disposition

¶59 Skaggs's convictions and sentences are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge